2008

Utah Department of Transportation v. Admiral Beverage Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff/Appellee,

vs.

ADMIRAL BEVERAGE CORPORATION,

Defendant/Appellant.

Supreme Court No. 20081054

Court of Appeals No. 20080027

OPENING BRIEF OF APPELLANT ADMIRAL BEVERAGE CORPORATION APPEAL FROM THE MEMORANDUM DECISION OF THE UTAH COURT OF APPEALS DATED NOVEMBER 28, 2008

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A copy of the Memorandum Decision of the Court of Appeals is attached to the Addendum at Tab 1.

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this matter under the provisions of Utah Code Ann. § 78A-3-102(3)(a) and Rule 45 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Whether the Court of Appeals erred in its construction and application of relevant precedent to Petitioner's claim for severance damages for loss of view.

Standard of Review: The interpretation and construction of relevant precedent is reviewed on appeal for correctness. *See Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, ¶ 12, 61 P.3d 1009 ("We review the court of appeals' decision for correctness, and give its conclusions of law no deference."); *Bearden v. Croft*, 2001 UT 76, ¶ 5, 31 P.3d 537 ("Correctness is also the standard for review of questions of statutory interpretation."); *State v. Montoya*, 887 P.2d 857 (Utah 1994) ("A court of appeals' interpretation of the effect of a prior judicial decision, whether one of its own or one of another court, constitutes a conclusion of law to which we accord no particular deference. Review is for correctness.").

2. Whether damages for loss of view may be segregated from overall severance damages.

Standard of Review: The Utah Supreme Court reviews the decision of the Court of Appeals for correctness, giving its conclusions of law no deference. *See Bear River Mut. Ins. Co. v. Wall*, 1999 UT 33, ¶ 5, 978 P.2d 460 ("On certiorari, we review the decision of the court of appeals, not the decision of the trial court. We review the court of appeals' decision for correctness and give its conclusions of law no deference.") (internal citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Utah Constitution, Article 1, § 22.

§ 78B-6-511(2), Utah Code Annotated.

Rule 45, Utah Rules of Appellate Procedures.

STATEMENT OF THE CASE

Appellee Utah Department of Transportation ("UDOT") filed its Complaint in this case (Case No. 970905361) on July 31, 1997, seeking to condemn a portion of property (the "Mark Property") then owned by Mark Investment Company for purposes of the I-15 reconstruction project. (R. 11-20.)

Prior to the reconstruction of I-15, both the north and south bound travel lanes were at about the same elevation as the Admiral and Mark Properties. This afforded Admiral an open view to the east from Ensign Peak on the north to Mount Timpanogos on the south. As a part of the I-15 reconstruction, the travel lanes were elevated to a height of some 27 feet thereby obstructing any view to the east from the remainder and leaving the remainder property in a virtual hole. (R. 181, 494-95.)

The Mark Property was purchased by Admiral on July 22, 1998 (R. 172), based upon fair market value appraisal of both the Mark Property and the adjoining Admiral Property, dated November 25, 1994, prepared by Jerry R. Webber, MAI. (R. 773-74.)

On August 1, 1997, UDOT filed its Complaint in Case No. 970905368 seeking to condemn a portion of the neighboring piece of property (the "Admiral Property"), which was owned by Admiral, also for purposes of the I-15 reconstruction project. (R. 1-10.)

The Admiral Property was purchased by Admiral on April 20, 2001 (R. 172-73), based upon a second fair market value appraisal prepared by Jerry R. Webber, dated October 17, 1996. (R. 773-74.) Jerry Webber also prepared a third fair market value appraisal of both the Mark Property and the Admiral Property dated September 7, 2007, as Admiral's expert witness in this case. *Id.* Admiral subsequently purchased the Mark property from Mark Investment Company. As a result, on July 14, 1999, the trial court entered an order consolidating Case No. 970905368 into this case, Case No. 970905361. (R. 63-64.)

In early 2005, the parties filed cross motions in limine regarding the type of evidence that would be admissible to prove Admiral's severance damages. (R. 151-163, 168-189.) Following oral argument, on October 31, 2005, Judge Stephen L. Roth entered a Memorandum Decision and Order, wherein he granted UDOT's motion in limine and denied Admiral's cross motion in limine ("Judge Roth's Order"). (Addendum Tab 2) (R. 492-502.) The effect to Judge Roth's Order, dated October 31, 2005, was to eliminate all of Admiral's claims for severance damages. (R. 500-501.)

However, Judge Roth noted the patent unfairness to Admiral of his ruling in a footnote at page 10 of his decision:

> The facts of this case illustrate the sometimes arbitrary nature of the rule that the court has relied on in making its decision here. Without so finding, it is certainly possible that the court's decision would have been significantly different if the offending elevated freeway ramp had been built six inches within, rather than six inches outside, the condemned parcel 109. In this regard Admiral has advanced an argument that has special appeal given the harsh result the difference of a matter of inches may produce. That argument proposes that if a taking is part of an integrated project (which Admiral argues is the case here), the landowner should be entitled to compensation for damages resulting from specific improvements related to the purpose of the taking and causing specific injury to the remainder, even if they were not constructed within the immediate boundaries of the take. *See* Admiral Beverage Corporation's Reply Memorandum in Support of Its Motion in Limine . . ., at 6-10. This approach recognizes that the actual reduction in value of the remainder from the improvement, as a practical matter, may be no different when it is located just within or just outside of the taken parcel.
>
> The court believes, however, that the repeated (and apparently unequivocal) holdings of the Utah Supreme Court, as addressed above, constrain it from seriously considering such an approach at this level, because it would involve a departure from current law. In this regard, the appellate courts are better equipped to identify, analyze and resolve the competing public and private interests, as well as the legal complications, that would be implicated in such a change in approach to severance damages. The resolution of these issues must therefore be left to some future appeal.

(Addendum Tab 2) (R. at 501.)

Because Judge Roth's Order involved unique legal issues of first impression in Utah, as noted above, he subsequently certified his ruling for appeal under Rule 54(b) of the Utah Rules of Civil Procedure. (R. 522-23.) However, on August 10, 2006, the Utah Court of Appeals dismissed Admiral's appeal without prejudice stating that Judge Roth's Order was "not an order eligible for certification under Rule 54(b)." (R. 556-59.)

Following the dismissal of Admiral's appeal, the case was assigned to the Honorable Robert P. Faust.

In February 2007, the Utah Supreme Court handed down its decision in *Ivers v. Utah Dept. of Transp.*, 2007 UT 19, 154 P.3d 802, which dealt with a factual setting virtually identical to the facts of the present case, as is explained *infra*.

In mid to late 2007, UDOT filed a series of additional motions in limine seeking to exclude evidence at trial relating to, among other things, Admiral's severance damages caused by the loss of view and visibility. (R. 656-64, 733-35, 780-82.) On December 27, 2007, the trial court entered a Minute Entry, wherein it granted UDOT's motions in limine (the "Minute Entry"). (Addendum Tab 3) (R. 862-64.) The practical effect of the trial court's Minute Entry was that it again disposed of Admiral's claims for severance damages. *See id.*

Although the *Ivers* case was referred to and quoted in Admiral's brief in the trial court, Judge Faust's Minute Entry dated December 27, 2007, does not even refer to the *Ivers* decision, which was handed down ten months earlier. Rather, Judge Faust's Minute Entry simply "refers the parties to Judge Roth's earlier decision and adopts the same here." (R. 866.)

On January 10, 2008, Admiral petitioned for permission to pursue an interlocutory appeal from Judge Faust's Minute Entry. (R. 872-74.) On January 30, 2008, the Utah Court of Appeals issued its order granting Admiral permission to pursue an interlocutory appeal on the following issue: "Whether the trial court erred in excluding evidence of severance damages based on loss of view from the remaining property." (R. 895.)

On November 28, 2008, the Court of Appeals affirmed the ruling of the District Court. (Addendum Tab 1.)

In its Memorandum Decision, the Utah Court of Appeals noted, as Judge Roth had, the harshness as to Admiral of its ruling:

> We acknowledge that application of the abutment rule in this case may seem harsh, given that Admiral's proximity to the now-elevated I-15 is very close and that its property abuts land taken for the overall project. Still, the ease of application and the predictability engendered by a bright-line rule are of such obvious benefit in this area of the law that if the abutment rule is to be moderated, it must come at the direction of our Supreme Court rather than of this court.

(Addendum Tab 1.)

On January 8, 2009, Admiral filed a Petition for Writ of Certiorari. That Petition was granted by the Utah Supreme Court on April 17, 2009.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals, which excludes evidence of severance damages based upon loss of view from Admiral's remaining property, is flawed for multiple reasons. First, the ruling conflicts with Article 1, Section 22 of the Utah Constitution. Second, the ruling conflicts with this Court's decision in *Ivers v. Utah Dept. of Transp.*, 2007 UT 19, 154 P.3d 802. Third, the Court of Appeals' decision to exclude evidence of severance damages based on loss of view will allow UDOT to reap a windfall at Admiral's expense. Finally, it is impossible for Admiral to segregate its loss of view damages from its overall severance damage amount. Accordingly, the Court should reverse the Court of Appeals' November 28, 2008 Memorandum Decision and remand this matter for further proceedings.

ARGUMENT

POINT I

The trial court's decision, affirmed by the Utah Court of Appeals, to exclude evidence of severance damage from loss of view, conflicts with Article 1, Section 22 of the Utah Constitution.

Both Amendment V of the United States Constitution and Article I, Section 22 of the Utah Constitution prohibit the taking of private property without just compensation.

In carrying out these constitutional mandates, Utah Code Ann. § 78B-6-511 provides that in a condemnation action the court, jury or referee must ascertain and assess:

> (1)(a) the value of the property sought to be condemned and all improvements pertaining to the realty;
>
> * * *
>
> (c) if it consists of different parcels, the value of each parcel and of each estate or interest in each shall be separately assessed;
>
> (2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff;

The compensation to which an owner is entitled for "severance damage" to the remainder under subsection (2) is the difference in the fair market value of the owner's remaining property before and after the taking. *See, e.g., State v. Cooperative Sec. Corp. of Church of Jesus Christ of Latter-Day Saints*, 247 P.2d 269, 271 (Utah 1952); *Carpet Barn v.*

State, 786 P.2d 770, 772-73 (Utah Ct. App. 1990).[1] Such a determination can only be made by considering all of the relevant facts and circumstances that affect market value:

> In making the [severance damage] appraisal, it is not only permissible, but necessary to consider all of the facts and circumstances that a prudent and willing buyer and seller, with knowledge of the facts, would take into account in arriving at market value.

J.D. Eaton, *Real Estate Valuation in Litigation*, 316 (1995) (quoting *State Road Com'n v. Rohan*, 487 P.2d 857, 859 (Utah 1971)). The effect of the taking on fair market value, therefore, should be the focal point of the assessment of severance damages to the remainder in the present case.

As stated in *Bagford v. Ephraim City*, 904 P.2d 1095, 1098 (Utah 1995):

> [u]nder general principles of eminent domain, property is not limited to land or improvements thereon, *id.*, but "[e]very species of property which the public needs may require . . . (including) legal and equitable rights of every description . . . liable to be appropriated."

Id. (citation omitted). Moreover, this Court has clearly set the rules by which just compensation for such a taking should be determined:

> For compensation to be fair and just it must reflect fair value of the land to the landowner. Just compensation means the owners must be put in as good a position money wise as they would have occupied had their property not been taken.

Utah State Road Commission v. Friberg, 687 P.2d 821, 828 (Utah 1984). Just compensation is the difference in fair market value of the owner's property before and after the taking. *See Utah Dept. of Transp. v. Ray Co. Corp.*, 599 P.2d 481 (Utah 1979).

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[1] Utah courts have long utilized the market value of property as the yardstick for determining recovery in eminent domain cases. *See, e.g., Southern Pacific Co. v. Arthur*, 352 P.2d 693, 695 (Utah 1960).

Despite the fact that no exception is made in these constitutional mandates or in Utah law for special treatment of UDOT in condemnation cases, UDOT has repeatedly asked Utah courts to sanction violations by it of the "just compensation" requirement and permit it to take valuable property rights without payment of compensation. This is so despite the fact that no other condemning authority, including the United States, is given that right.

Utah cases which have permitted the taking of privately held rights without payment of compensation make no effort to reconcile the undeniable inconsistency and conflict of such takings with the above quoted constitutional, statutory or case law. No justification is given for the unfair and forced transfer to UDOT of substantial property rights without payment of any compensation, let alone just compensation.

This case presents a stark example of the inconsistency and unfairness of the UDOT's position. Each of the parcels taken had been purchased by Admiral based upon appraised fair market value. It is undisputed that substantial severance damages resulted from the taking. However, the trial court and the Court of Appeals approved, with some reluctance, UDOT's request that it be exempt from the obligation all other condemning authorities have to meet, and provide just compensation for the property rights taken from Admiral. At the time Admiral purchased each of the two parcels, it could not have known or expected that UDOT would take a significant portion of the value Admiral purchased without having to pay anything for that value.

POINT II

The trial court's decision, affirmed by the Utah Court of Appeals, to exclude evidence of severance damages based on loss of view conflicts with the Utah Supreme Court's decision in *Ivers v. Utah Dept. of Transp.*, 2007 UT 19, 154 P.3d 802 .

In February of 2007, the Utah Supreme Court issued its decision in *Ivers v. Utah Dept. of Transp.*, 2007 UT 19, 154 P.3d 802, essentially rewriting important rules regarding severance damages relating to loss of view and visibility. The Utah Supreme Court declared that "existing Utah law does recognize an easement of view from one's property as a protectable property right." *Id.* at ¶ 16. The trial court's Minute Entry in this case, affirmed by the Court of Appeals, fails to address, and in important respects is directly contrary to, the *Ivers* decision.

In *Ivers*, just like the present case, UDOT argued that the landowner was not entitled to any damages for loss of view because "[n]o portion of the raised highway, its footings, or its foundation was constructed on the condemned land; rather, the condemned land was used for the creation of the frontage road and for improvements to Shephard Lane." *Id.* at ¶ 3. Despite this fact, the court in *Ivers* ruled that loss of view severance damages are appropriate "when the view-impairing structure is built on land other than the condemned land, but the condemned land is used as part of a single project and that use is essential to completion of the project." *Id.* at ¶ 26.

It would be difficult to find a case more on point with the present case than *Ivers*. In that case:

> [T]he State condemned a 0.048-acre portion of Arby's 0.416-acre lot in order to build a one-way frontage road parallel to, and connecting with, the newly widened and elevated highway.
>
> * * *
>
> No portion of the raised highway, its footings, or its foundation was constructed on the condemned land; rather, the condemned land was used for the creation of the frontage road and for improvements to Shephard Lane.
>
> * * *
>
> The elevation of the highway has obstructed both the view to the east from Arby's land and the visibility of Arby's property from the highway.
>
> * * *
>
> [T]he pursuant loss of view and visibility, diminished the market value of the remaining land.

Id. at ¶¶ 2-5. After reviewing the facts, the Utah Supreme Court stated as follows:

> [T]he raised highway . . . was not built in any part on the condemned portion of Arby's land. Rather, the condemned land was used for the construction of a small portion of the frontage road. The frontage road itself causes no damage to the view from Arby's remaining land. However, . . . the land was condemned as part of UDOT's plan to raise the highway and was therefore condemned as part of a single project.
>
> Whether severance damages are awardable hinges on whether the severance of the condemned property, and the use of *that* property, *caused* damage to the remaining property. Utah Code section 78-34-10(2) describes severance damages as those damages "which will accrue to the portion [of property] not sought to be condemned *by reason of its severance* from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff." This section has no express requirement that the view-impairing structure be built directly on the condemned land. Rather, it only requires that the severance damages be caused by the condemnation of, and use of, the property.

Id. at ¶¶ 17-18 (emphasis added).

Based upon these principles, the Supreme Court made the following ruling:

> When land is condemned as part of a single project–even if the view-impairing structure itself is built on property other than that which was condemned–if the use of the condemned property is essential to the completion of the project as a whole, the property owner is entitled to severance damages. Logically, if the project could not be built without taking the condemned land, the impairment of view caused by the completion of the project could and would not have arisen "but for" the condemnation. This is the very essence of cause.

Id. at ¶ 21 (emphasis added).

The key facts noted by the Utah Supreme Court in the *Ivers* case are for all essential purposes identical to the facts in the present case:

1. Both cases involved the taking of property that was an essential part of the overall project.[2]

2. In both cases, the elevated roadway blocked the view from the remaining property.

3. In neither case was the view offending structure constructed on the land taken.

4. In both cases, the property taken was used by UDOT to construct an access road and other improvements related to the project that separated the damaged remainder property from the project improvements.

5. The remaining property abuts the property taken to relocate the access road and a large storm drain.

These facts satisfy the Supreme Court's ultimate holding in *Ivers* that:

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[2]It is undisputed that the taking of Admiral's property was necessary and essential for the I-15 project. This can be shown through UDOT's own condemnation documents. (R. 673. 678-684).

> With respect to lost view, severance damages are appropriate under Utah Code section 78-34-10 where a portion of property is condemned by the state and the condemnation of that land causes damage to the noncondemned portion of land. Damage to the noncondemned portion of land is "caused" by the severance . . . when the view-impairing structure is built on land other than the condemned land, but the condemned land is used as part of a single project and that use is essential to completion of the project.

Id. at ¶ 26 (emphasis added). That is exactly what has occurred in this case.

Despite the obvious similarities between the *Ivers* case and the present case, the Court of Appeals summarily dismissed the *Ivers* decision as distinguishable. Moreover, the decision of the Court of Appeals to exclude evidence of severance damages based on loss of view fails to note that the facts of the present case comply fully with all of the requirements of the *Ivers* decision and of Utah Code Ann. § 78B-6-511(2).[3]

The case of *Utah State Road Commission v. Miya*, 526 P.2d 926 (Utah 1974), cited in passing by the Court of Appeals, is not on point. The offending structure in that case was in fact erected "within the existing right-of-way."

The Court there noted:

> The rights of access, light, and air are easements appurtenant to the land of an abutting owner on a street; they constitute property rights forming part of the owner's estate. These substantial property rights, although subject to reasonable regulation, may not be taken away without just compensation.
>
> * * *

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[3]Utah Code Ann. § 78B-6-511(2) provides:

> (2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff;

> One of the rights appurtenant to abutting property is that of receiving light and air from the highway and an abutting owner is entitled to compensation for infringement of his right to light and air by a structure in the highway, even if it is a proper highway use.
>
> * * *
>
> An owner of land abutting on a street is also in possession of an easement of view, which constitutes a property right which may not be taken without just compensation.

As can be noted in the quoted excerpts, the Court's decision did not preclude claims for severance damages where, as here, the offending structure in fact caused substantial damage to the remainder that abuts the land taken as an "essential part of the project" for relocation of the access road and a large storm drain. Nor does the Court there indicate that the abutting "street" or "highway" must be owned by the Department of Highways.[4]

In summary, the Court of Appeals failed to recognize the factual similarities between this case and the *Ivers* case. Additionally, the decision of the Court of Appeals does not deal with the clear violation of the constitutional requirement that just compensation be paid for the taking of substantial property rights, but instead simply opts for "the ease of application and the predictability engendered by a brite-line rule [which] are of such obvious benefit in this area of the law. . . ."

---

[4] Also not on point is the case of *State v. Harvey Real Estate*, 2002 UT 107, 57 P.3d 1088, which was simply cited but not discussed by the Court of Appeals. That case involved (1) a claim for closure of an intersection and (2) abandonment by UDOT but no claim for loss of view or visibility. *See id.*

POINT III

The decision to exclude evidence of severance damages based on loss of view will allow UDOT to reap a windfall at Admiral's expense.

As noted above, the so-called "brite-line rule" adopted by the Court of Appeals would permit the UDOT to appropriate a substantial portion of the property value belonging to Admiral. The decision to eliminate the value of view from the property from fair market value provides a very significant windfall in the amount of that value to UDOT at Admiral's expense because that value was specifically included in the price Admiral paid for Lot 17 just two years previously, and for Lot 16 at the same time of the take.

Admiral's expert, Jerry Webber, made three separate appraisals of the properties in question. The first appraisal, concerning the fair market value of Lot 16 and Lot 17, was dated November 25, 1994. Admiral purchased Lot 17 in March of 1995, based upon the fair market value as reflected in that appraisal. Mr. Webber made a second appraisal that concerned the fair market value of Lot 16 in October of 1997. Admiral purchased Lot 16 in July of 1998, based upon the fair market value as reflected in that appraisal.

The harshness of the trial court's ruling is demonstrated by Admiral's purchase of the property for its appraised fair market value, which clearly included both the value of view and visibility, only to have UDOT take the property without paying any compensation for view or visibility. Thus, the substantial value representing both view and visibility are automatically shifted from Admiral to UDOT without a single dollar being paid as compensation. This violates the constitutional mandate that property not be

taken without payment of just compensation. *See* Utah Const. Art. I, § 22; *Southern Pac. Co. v. Arthur*, 352 P.2d 693, 695 (Utah 1960) ("The standard of what is 'just compensation' in the ordinary case is the market value of the property taken, that is what a willing buyer would pay to a willing seller.").

There is no justifiable reason why UDOT, unlike anyone else, should be permitted to acquire valuable property rights without paying just compensation.

POINT IV

It is impossible to segregate loss of view damages from Admiral's overall severance damage amount.

In preparing his appraisal report, Mr. Webber determined Admiral's severance damages to the remainder, based upon all of the factors that a prudent and willing buyer and seller, with knowledge of the facts, would take into account in arriving at fair market value, including but not limited to, view and visibility. Mr. Webber was unable despite extensive study and effort to identify comparable sales that did not take into account both view from the property and visibility of the property from I-15. (R. at R772-75.) View and visibility are critical factors that affect any piece of property along the 1-15 corridor. Any property located adjacent to I-15 will have a combination of both such values and it is impossible to allocate and assign a separate value to each. Licensed appraisers cannot speculate as to such values, which can vary widely from one property to another, and cannot be justified with true comparables generally used and accepted in appraisal practices. As a result, it is impossible to segregate out loss of view damages from Admiral's overall severance damage amount.

Moreover, the trial court's Minute Entry and the Court of Appeals' Memorandum Decision are both directly contrary to the Utah Supreme Court's decision in *State Road Comm'n v. Rohan*, 487 P.2d 857 (Utah 1971. In *Rohan*, the State Road Commission took a position similar to the position espoused by UDOT in this case. The State argued that it was improper to permit the defendants' expert to take into consideration and testify concerning diminution in value resulting from increased noise from the highway. The Utah Supreme Court rejected the State's position and held that the testimony of the expert who considered the increase in noise was properly allowed, notwithstanding the fact that it would have been improper to segregate and evaluate noise as a separate item of damage. The *Rohan* court held that

> there should not be any attempt to isolate and appraise as a separate item of damage any loss of value due to noise or any other such intangible factor; and this is true even where there has been an actual taking of property. Any such attempt to so segregate and place a separate money value on the effect the factor of noise would have upon property would inevitably involve the uncertainty and impracticability above referred to in this decision. This should not be done either for the purpose of making an award of a separate item of damage, as was dealt with in the *Williams* case, nor for the purpose of fixing a separate amount to be deducted from the severance damage to the remaining property as plaintiff contends here.
>
> On the other hand, in order to correctly evaluate the severance damages, i.e., the damage to the remaining property, it is obvious that it should be viewed in the composite as it will be after the taking and after the improvement has been constructed. In making the appraisal, it is not only permissible but necessary to consider all of the facts and circumstances that a prudent and willing buyer and seller, with knowledge of the facts, would take into account in arriving at its market value. The testimony of the defendant's expert which is here under attack indicates that he conformed to that formula. He properly and candidly included the facts that the new freeway adjacent to the property, with the attendant increase in traffic and noises, were among the factors considered in making his appraisal. But there was no attempt to segregate and place a separate money value

> thereon. We think the trial court was well advised in admitting his testimony and that no prejudicial error was committed.

Id. at 859 (emphasis added).

The same is true in this case. Mr. Webber properly considered loss of view as one of many factors that reduce the market value of Admiral's remaining property. The decrease in value resulting from loss of view cannot be segregated out and assigned a separate money value in assessing the total mix of factors that Mr. Webber considered. Mr. Webber stated as much in his affidavit. In fact, it would have been improper for Mr. Webber to attempt to segregate out a separate amount related to loss of visibility and deduct that amount from the overall severance damages. *See Rohan*, 487 P.2d at 859 ("This should not be done either for the purpose of making an award of a separate item of damage, . . . nor for the purpose of fixing a separate amount to be deducted from the severance damage to the remaining property as plaintiff contends here.").[5]

CONCLUSION

For the foregoing reasons, it was error to exclude evidence of Admiral's severance damages relating to loss of view from the remaining property. Therefore, the Court should reverse the trial court's December 27, 2007 Minute Entry and the Memorandum Decision of the Court of Appeals, and remand this matter for further proceedings consistent with the Court's ruling herein.

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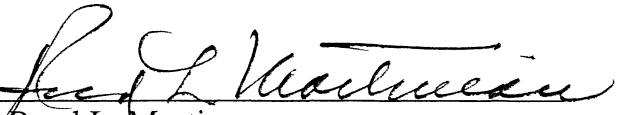
[5]Counsel for UDOT was extremely critical of the Utah Supreme Court's decision in *Rohan*, referring to it as an "embarrassment to the Court." (R. 994 at 48-49.) Despite counsel's personal opinion regarding this Court's decision, *Rohan* has never been overturned and remains binding case law.

DATED this 27 day of May, 2009.

SNOW, CHRISTENSEN & MARTINEAU

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of May, 2009, I caused a true and correct copy of the foregoing OPENING BRIEF OF APPELLANT ADMIRAL BEVERAGE CORPORATION FROM THE MEMORANDUM DECISION OF THE UTAH COURT OF APPEALS DATED NOVEMBER 28, 2008 to be mailed to the following:

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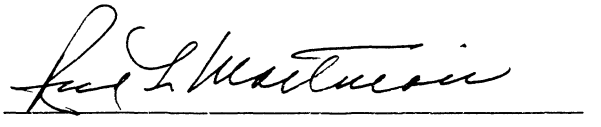
Attorney for Plaintiff/Appellee



17359-3 1108884

ADDENDUM

1. Memorandum Decision of the Court of Appeals, dated November 28, 2008.

2. Memorandum Decision and Order, of Judge Roth, dated October 31, 2005.

3. Trial Court Minute Entry, dated December 27, 2007.

Tab 1

IN THE UTAH COURT OF APPEALS

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Department of Transportation, Plaintiff and Appellee, v. Admiral Beverage Corporation, Defendant and Appellant.	MEMORANDUM DECISION (For Official Publication) Case No. 20080027-CA F I L E D (November 28, 2008) 2008 UT App 426

Third District, Salt Lake Department, 970905361
The Honorable Robert P. Faust

Attorneys: David Jason Hawkins and Reed L. Martineau, Salt Lake City, for Appellant
Mark L. Shurtleff and Brent A. Burnett, Salt Lake City, for Appellee

---

Before Judges Bench, Davis, and Orme.

ORME, Judge:

¶1 In this interlocutory appeal, Admiral Beverage Corporation challenges the trial court's granting of three motions in limine. The thrust of these rulings was to preclude Admiral from showing, as evidence of its severance damages, that the value of its remaining property had been diminished due to the loss of view and visibility caused by the reconstruction of Interstate 15, in connection with which some of its property had been taken. When, as here, motions in limine are based on a court's legal conclusions, we review the decision for correctness. See Utah Dep't of Transp. v. Ivers, 2005 UT App 519, ¶ 9, 128 P.3d 74, aff'd in part and remanded, 2007 UT 19, 154 P.3d 802.

¶2 Admiral owns two adjacent lots west of I-15 in Salt Lake County. The property does not actually abut I-15 but rather abuts the west side of 500 West, a surface street that acts as a frontage road in the area. In other words, 500 West runs between Admiral's property and I-15. As indicated, UDOT had condemned a portion of Admiral's property as part of the massive I-15 reconstruction project, although the property taken was used to

widen 500 West, which the remaining property abuts, rather than I-15, which it does not.

¶3 Admiral relies too heavily on Ivers v. Utah Department of Transportation, 2007 UT 19, 154 P.3d 802, for its contention that severance damages for loss of view are warranted in this case. See id. ¶ 26. While Ivers indicated that severance damages may have been appropriate in that case, pending resolution of a factual issue, see id., the case included an important fact that is not present here--the landowner's property in Ivers abutted the state road whose reconstruction was alleged to have caused the loss of view. See id. ¶¶ 2-4. And from our review of Utah case law, it seems clear that the settled rule is that the landowner's remaining property must actually abut the property with the view-impairing structure.[1] See Utah State Rd. Comm'n v. Miya, 526 P.2d 926, 928 (Utah 1974) ("The rights of access, light, and air are easements appurtenant to the land of an abutting owner on a street; they constitute property rights forming part of the owner's estate."). Accord Ivers, 2007 UT 19, ¶ 13 (quoting Miya for the same point); State v. Harvey Real Estate, 2002 UT 107, ¶ 13, 57 P.3d 1088 (quoting Miya for the same point and stating that "in order to recover for such a taking, an owner must show that 'the structure violates some right appurtenant to the abutting property or otherwise inflicts some special and peculiar injury'") (citation omitted).

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1. We note that Ivers v. Utah Department of Transportation, 2007 UT 19, 154 P.3d 802, dealt with a different issue in its analysis of whether severance damages were appropriate for loss of view, i.e., whether a landowner is entitled to severance damages when the view impairing structure is not built on the condemned portion of the land, see id. ¶ 1, and held:

> With respect to lost view, severance damages are appropriate under Utah Code section 78-34-10 where a portion of property is condemned by the state and the condemnation of that land causes damage to the noncondemned portion of land. Damage to the noncondemned portion of land is "caused" by the severance in two situations: (1) when the view-impairing structure is built on the condemned land, or (2) when the view-impairing structure is built on land other than the condemned land, but the condemned land is used as part of a single project and that use is essential to completion of the project.

Id. ¶ 26 (emphasis in original). We do not, however, interpret Ivers as eliminating the abutment rule.

Admiral's remaining property does not abut I-15, the elevation of which impedes the view from Admiral's property; rather, it abuts 500 West.

¶4 We acknowledge that application of the abutment rule in this case may seem harsh, given that Admiral's proximity to the now-elevated I-15 is very close and that its property abuts land taken for the overall project. Still, the ease of application and the predictability engendered by a bright-line rule are of such obvious benefit in this area of the law that if the abutment rule is to be moderated, it must come at the direction of our Supreme Court rather than of this court.

¶5 Affirmed.[2]

Gregory K. Orme, Judge

¶6 I CONCUR:

James Z. Davis, Judge

¶7 I CONCUR IN THE RESULT:

Russell W. Bench, Judge

---

2. Insofar as Admiral still seeks to admit evidence addressing the reduced visibility of its property to motorists traveling the nearby highways, its argument is definitively foreclosed by Ivers. See 2007 UT 19, ¶¶ 12-15.

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of November, 2008, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

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Judicial Secretary

TRIAL COURT: THIRD DISTRICT, SALT LAKE, 970905361
APPEALS CASE NO.: 20080027-CA

Tab 2

THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff,

vs

ADMIRAL BEVERAGE CORPORATION (Assignee of Mark Investment Trust), PARK CITY WEST & ASSOCIATES, VALLEY BANK & TRUST COMPANY nka BANK ONE, UTAH; and VALLEY MORTGAGE COMPANY nka UTAH INVESTMENT COMPANY,

Defendants.

MEMORANDUM DECISION and ORDER (Cross-Motions in Limine)

CONSOLIDATED:
Case No. 970905361CD
Case No. 970905368CD

Judge Stephen L. Roth

UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff,

vs.

ADMIRAL BEVERAGE CORPORATION,

Defendant.

Plaintiff Utah Department of Transportation ("UDOT") filed a Motion in Limine to which defendant Admiral Beverage Corporation ("Admiral") responded with a cross-motion, Motion in Limine of Defendant Admiral Beverage Corporation to Admit Evidence of All Factors That Affect Fair Market Value ("Admiral's Motion in Limine"). While both motions are nominally focused on

the parties' competing views of the admissibility of basically the same evidence, they recognize that the real issue is the scope of severance damages that may be awarded to defendants under Utah condemnation law. The parties submitted memoranda supporting their own motions and opposing their opponents, as well as reply memoranda. The court heard argument on the motions on June 28, 2005, where UDOT was represented by Randy S. Hunter, Assistant Attorney General, and Admiral was represented by Rex E. Madsen (who argued) and Reed L. Martineau, Snow Christensen & Martineau. The court gave leave to Admiral to submit a new survey in response to one submitted by UDOT just before the hearing. That survey was provided to the court on August 31, 2005, and the matter was submitted for decision. Having considered the memoranda, affidavits and other evidence submitted, along with the arguments of counsel, the court GRANTS UDOT's Motion in Limine and DENIES Admiral's Motion in Limine, for the reasons set forth below.

DECISION

A. Factual Background.

The relevant facts do not appear to be disputed in any material way. Admiral owns two adjacent lots directly to the west of the I-15 freeway, bordering 500 West, which serves as a frontage road in that area, running north and south between the Admiral lots and the west side of the freeway. In connection with the I-15 reconstruction project, the west side of the freeway in that area was moved closer to the Admiral lots, requiring that the 500 West frontage road also be moved further to the west and onto the east side of Admiral's property, resulting in the condemnation of what are now identified by UDOT as parcels 109 and 110, which are the subject of these consolidated cases.

Before reconstruction, the existing freeway lanes had an elevation about two feet higher than the surface of Admiral's property. The reconstructed freeway is elevated considerably higher, with a portion of the freeway wall reaching a height of about 28 feet at a point about six inches outside and to the west of the southeast corner of parcel 109, the former southeast corner of the Admiral property, and about 62 feet from the nearest point of Admiral's property remaining after the condemnation.[1] While 500 West was reconstructed on the taken parcels, no part of the rebuilt freeway itself is located on that property.

Based on an appraisal, UDOT deposited into court a total of $163,100 as payment of just condemnation for the taking of parcels 109 and 110. Admiral appears to have only minimal disagreement that the deposited amount is a fair value for the property taken, as valued on a square-footage basis. The central issue is whether there are additional compensable severance damages to the remainder of Admiral's property. Based on the reports of its own expert appraisal witnesses, Admiral claims that the market value of the remaining property has been reduced by "(a) loss of air, light, view, visibility and aesthetics, and (b) increased fumes and dust from traffic traveling on the reconstructed I-15 freeway . . . ." Admiral's Memorandum in Support of its Motion in Limine to Admit Evidence of All Factors That Affect Fair Market Value and in Opposition to Plaintiff's

---

[1] Admiral originally argued that a portion of the freeway wall at issue was actually built within the southeast corner of parcel 109, based on UDOT engineering drawings that appeared to support such a conclusion. About two weeks before the hearing, however, UDOT submitted, through the Affidavit of Keith Hafen, a more detailed survey that showed the wall, at its nearest point, to be six inches outside of the condemned parcel 109. Subsequent to the hearing, Admiral had its own survey done, which confirmed that the wall was outside of parcel 109, although four to five inches at its closest point rather than six, a difference that is not material to the issues before the court.

Motion in Limine ("Admiral's Memorandum in Support") at 2 UDOT contends that these rights are not compensable as severance damages under applicable law

B. Analysis

The factors identified by Admiral's appraisers as damaging the remaining property seem to fall into three categories the loss of visibility and prominence of the remainder due to the size and location of the new freeway structures, loss of air and light to, and view from, the remaining property, and the increase in noise, dust, fumes and so on from increased traffic flow nearer to the remainder than the prior freeway The claim for loss of visibility is the only subject addressed in UDOT's Motion in Limine, but all of these factors are addressed in Admiral's Motion in Limine, which is imposed *in toto* by UDOT The loss of visibility issue is addressed separately as a matter of first impression in Utah

1. Loss of Visibility

There seems to be no dispute that reconstruction of the portion of I-15 passing by the Admiral property, which moved the freeway closer and significantly raised its grade, restricts the visibility of the remainder parcels from passing vehicles in comparison with the prior freeway configuration The issue of whether reduced visibility is a compensable severance damage has not been directly addressed by Utah appellate courts Nevertheless, the court believes that analogous Utah case law provides guidance in this area

A long line of Utah cases has established the principle that the appurtenant rights of an owner of abutting property do not include an interest in the traffic flow from a public road or highway passing by his property that justifies severance damages if reduced or taken away In *Hampton v State Road Commission*, 445 P 2d 708 (Utah 1968), the court noted that "the right of ingress or

egress to or from one's property [does not] include any right in and to existing public traffic on the highway, or any right to have such traffic pass by one's abutting property." *Id.* at 711. The court explained:

> The reason is that all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are "*damnum absque injuria*," or damage without legal injury.

Id. at 347. *See also*, *Weber Basin Water Conservancy District v Hislop*, 362 P.2d 580, 581 (Utah 1961) ("The owner of land abutting on a street or highway has no property or other vested right in the flow of traffic on that street or highway and is not entitled to compensation when that flow of traffic is diminished as a result of eminent domain proceedings"); *Utah State Road Commission v. Miya*, 526 P.2d 926, 928 (Utah 1974) ("A property owner has no right to a free and unrestricted flow of traffic past his premises, and any impairment or interference with this flow does not entitle the owner to compensation."); *Utah Department of Transportation v. Harvey Real Estate*, 2002 UT 107, ¶14 (citing *Miya* and quoting *Hampton* for the principle stated above).

Here, a significant portion of Admiral's claimed severance is based on the reduction in visibility from the reconstructed freeway when compared to its original configuration. The visibility that was lost, under these circumstances, was necessarily a function of the passage of traffic. In other words, the original visibility of the site resulted from the construction of the freeway by the State, which exposed the Admiral property to the view of passing motorists who used the freeway as a route of travel. Under existing law, if the State had moved the freeway route horizontally, to a different location far enough from the Admiral property that it traffic no longer passed by it, the

deprivation of the passing traffic itself would not be a compensable injury. It is difficult to see how moving the freeway vertically, so that traffic continues to pass by the property but without being able to see it, results in an injury that is any different as a practical matter or that is legally distinctive in any meaningful way. The court therefore does not believe that diminishment of visibility from a road or highway is any more compensable as severance damages than a more general diversion of traffic flow would be.

Moreover, even if a right to visibility were found to be appurtenant to landowners abutting a highway or road, the rights of abutting owners with respect to a freeway are significantly more limited. I-15 is a "[l]imited-access facility," which is defined by statute as "a highway especially designated for through traffic, and over, from, or to which neither owners nor occupants of abutting lands nor any other persons have any right or easement, or have only a limited right or easement of access, light, air, or view." U.C.A. § 72-1-102 (11). This definition suggests, among other things, an intent to restrict the appurtenant rights of lands abutting freeways so as to limit the scope of severance damages attributable to such rights.

Admiral relies in part on *People v. Ricardi*, 144 P.2d 799 (Cal. 1944), and subsequent decisions following it, for the proposition that a landowner is entitled to severance damages for the loss of the view of his property from a highway. The California Court of Appeals, however, subsequently held that *Ricardi's* "right to a view" does not apply to freeways The court upheld the lower court's conclusion that an owner "has no legal right to a view of his property from the freeway:"

> A freeway is unlike a highway. An abutter/landowner has a right to a view from a public road or highway. However, while the purpose of a highway is to provide landowners with abutter's rights, the purpose of a freeway is to eliminate those rights.

People ex rel. Department of Transportation v. Wilson, 31 Cal.Rptr.2d 52, 55 (Cal.App. 1994) (citation to *Ricardi* omitted). The court noted that the purpose of roads or highways is to allow access from abutting private property and to allow travelers along the road or highway "to view a business, drive into it, patronize it, and reenter the highway" but that "[s]uch purposes are antagonistic to the purpose of a freeway," which is designed to "'prevent just that sort of thing.'" *Id.* (citations omitted). The court went on to discuss a California statute similar in import to Utah's:

> For that reason, *Streets and Highway Code section 23.5* provides that owners of abutting lands to a freeway have limited or no right of access to or from their abutting lands. Obviously a freeway restricts rights of access and related rights such as the right to a view.

Id.

Therefore, even if the court were inclined to find a right to a view of one's abutting property from a road or highway under Utah law, the court concludes that a landowner "has no legal right to a view of his property from the freeway."

2. Other Damages.

Admiral also claims it is entitled to severance damages for "loss of air, light, view, visibility and aesthetics," a bundle of rights that may include, but goes beyond, the right to a view from the freeway, as well as for "increased fumes and dust from traffic traveling on the reconstructed I-15 freeway." The court concludes that Utah law does not allow recovery for such damages under the circumstances of these consolidated cases.

The claimed damages appear to arise either from the elevation of the grade of the freeway or from increased traffic due to the freeway improvements. Neither the construction of the elevated ramp or the reconstruction of the freeway itself, however, occurred on Admiral's property; the only

improvement constructed on Admiral's property was the relocation of the 500 West frontage road. Utah cases have been consistent in holding that severance damages are limited to those caused by the taking itself or attributable to improvements constructed on the taken property. The court in *Miya*, in finding compensable the loss of view from a remainder property caused by construction of a highway highway structure, noted that "the loss of view occasioned by a proposed public structure to be erected, *in part at least*, upon a parcel of property taken by condemnation from a unit" was a factor to be taken into account in determining severance damages. *Miya*, 526 P.2d at 929 (emphasis added).

This precept was emphasized in *Utah Dep't of Transportation v. D'Ambrosio*, 743 P.2d 1220 (Utah 1987), where the state took a private road to two residences, which it paved and made public in connection with a highway extension. The Court rejected the landowners' claim that they were entitled to severance damages from construction of the highway:

> The general rule is that damages attributable to the taking of others' property and the construction of improvements thereon are not compensable. Such damages suffered generally by all the property owners in the area are deemed consequential.
>
> Severance damages are those caused by the taking of a portion of the parcel of property where the taking or the construction of the improvement *on that part* causes injury to that portion of the parcel not taken.

Id. at 1221-22 (emphasis in the original).

The court reemphasized its *D'Ambrosio* holding in *Harvey Real Estate, supra*, an appeal of a trial court's grant of the state's motion in limine excluding certain severance damage evidence. In *Harvey*, the landowner sought severance damages for the diminution in value of its remainder property resulting from the closure of an intersection as part of a road project for which a portion of its land was taken. Similar to an argument Admiral makes here, the owner contended that the

intersection closure "was made possible only by the taking of Harvey's property . . . ." *Harvey*, 2002 UT 107, ¶12. Harvey asserted that limiting severance damages to only those resulting from improvements constructed at least in part on the portion of the property taken conflicted with the broad language of U.C.A. § 78-34-10(2), which provides for assessment of damages to a remainder from the taking of a portion of the property and from "the construction of the improvement in the manner proposed by the plaintiff [condemning authority]." The court disagreed:

> Section 78-34-10 gives a landowner the right to present evidence of damages caused by the construction of the improvement made on the severed property. It does not given the landowner the right to present evidence of damages caused by other facets of the construction project.
>
> * * *
>
> We held essentially the same in *Utah Department of Transportation v. D'Ambrosio*, 743 P.2d 1220, 1222 (Utah 1987), although we did not reference section 78-34-10(2). There we stated that "severance damages are those *caused by* the taking of a portion of the parcel of property where the taking *or the construction of the improvement on that part causes* injury to that portion of the property not taken." (Emphasis added.) Our holding today also accords with the well-established common law principle that severance damages "may be made for any diminution in the value of [an owner's non-condemned land], as long as those damages were *directly caused by the taking itself* and by the condemnor's use of the land taken." 26 Am.Jur. 2d *Eminent Domain* § 368 (1996) (emphasis added) . . . .

Id at ¶¶ 10-11 (interpolations and emphasis in the original, some citations omitted).

The court therefore concludes that damages resulting from construction of the elevated ramp just outside the taken parcels, as well as damages from the reconfiguration of the freeway as part of the reconstruction project are not compensable as severance damages under Utah law. This appears to include evidence related to all of "the components of severance damages" that were "taken into account" by Admiral's expert appraisers and enumerated at paragraph 7 of the Affidavit of Robert

A. Steele and paragraph 7 of the Affidavit of John C. Brown (Exhibits A and B, respectively, to Admiral's Memorandum in Support), except for "loss of parking."[2]

ORDER

It is therefore ORDERED that UDOT's Motion in Limine is GRANTED, and Admiral's Motion in Limine to Admit Evidence of All Factors That Affect Fair Market Value is DENIED.

DATED this 31st day of October, 2005.

BY THE COURT:

Stephen L. Roth
DISTRICT JUDGE

[2] The facts of this case illustrate the sometimes arbitrary nature of the rule that the court has relied on in making its decision here. Without so finding, it is certainly possible that the court's decision would have been significantly different if the offending elevated freeway ramp had been built six inches within, rather than six inches outside, the condemned parcel 109. In this regard Admiral has advanced an argument that has special appeal given the harsh result the difference of a matter of inches may produce. That argument proposes that if a taking is part of an integrated project (which Admiral argues is the case here), the landowner should be entitled to compensation for damages resulting from specific improvements related to the purpose of the taking and causing specific injury to the remainder, even if they were not constructed within the immediate boundaries of the take *See* Admiral Beverage Corporation's Reply Memorandum in Support of Its Motion in Limine . . ., at 6-10. This approach recognizes that the actual reduction in value of the remainder from the improvement, as a practical matter, may be no different when it is located just within or just outside of the taken parcel.

The court believes, however, that the repeated (and apparently unequivocal) holdings of the Utah Supreme Court, as addressed above, constrain it from seriously considering such an approach at this level, because it would involve a departure from current law. In this regard, the appellate courts are better equipped to identify, analyze and resolve the competing public and private interests, as well as the legal complications, that would be implicated in such a change in approach to severance damages. The resolution of these issues must therefore be left to some future appeal.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 970905361 by the method and on the date specified.

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Dated this 31st day of Oct, 2005.

Deputy Court Clerk

Tab 3

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION,	MINUTE ENTRY
Plaintiff,	CASE NO. 970905361 970905368
vs.	(Consolidated)
ADMIRAL BEVERAGE CORPORATION (ASSIGNEE OF MARK INVESTMENT COMPANY); PARK CITY WEST & ASSOCIATES; VALLEY BANK & TRUST COMPANY, nka BANK ONE, UTAH; VALLEY MORTGAGE COMPANY, nka UTAH INVESTMENT COMPANY,	
Defendants.	
UTAH DEPARTMENT OF TRANSPORTATION,	
Plaintiff,	
vs.	
ADMIRAL BEVERAGE CORPORATION,	
Defendant.	

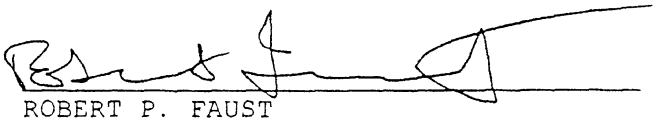
UDOT's Motions in Limine on the issue of view and visibility and concerning Jerry P. Weber's testimony on the subject of severance damages caused by loss of view and visibility was heard by the Court on December 18, 2007, at 10:00 a.m. After hearing arguments thereon, review of the pleadings and a specific review of the Decision dated October 31st, 2005 issued by Judge Roth in this case, the Court grants UDOT's Motions in Limine. The Court also refers the parties to Judge Roth's decision and

adopts the same here.

Defendant is able to assert claims for any severance damages relating to abutment rights pertaining to being an adjoining landowner to 500 West.

This Minute Entry decision will stand as the Order of the Court.

Dated this 24th day of December, 2007.



ROBERT P. FAUST
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 27 day of December, 2007:

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